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In The

Supreme Court of the United States

No. 73-613

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA—LOCAL NO. 540 AND RALPH D. EDGERTON,
Petitioners,

v.

GEORGE D. LUSK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW AND SET ASIDE DECISION OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The

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No. _____

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA—LOCAL NO. 540 AND RALPH D. EDGERTON,
Petitioners,

v.

GEORGE D. LUSK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW AND SET ASIDE DECISION OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada—Local No. 540 and Ralph D. Edgerton, petition the Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. This petition is made with reference to the Court of Appeals' July 9, 1973 decision in *George D. Lusk* v. *United Associa-*

tion of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada—Local No. 540 and Ralph D. Edgerton, No. 73-1065, —F. 2d —(CA 4, 1973). Copy of said decision and judgment is appended hereto.

Since the said decision and judgment of the Fourth Circuit are *per curiam,* the Petitioners are requesting the clerk of the court, pursuant to paragraph 1 of Rule 21 of the Rules of the Supreme Court of the United States, to certify and provide for transmission to this Court the following parts of the record below:

1. Appendix.—This includes, among other things, the opinions and orders (including findings of fact and conclusions of law) of the District Court referenced in the Fourth Circuit's *per curiam* decision and judgment of July 9, 1973.

2. Petitioners' brief and reply brief in the court below.

3. Petitioners' Motion for Summary Reversal in the court below.

4. Petitioners' letter, by counsel, dated March 26, 1973, addressed to Mr. William K. Slate, II, Clerk, United States Court of Appeals for the Fourth Circuit.

Petitioners' *statement of the case* and *argument* herein are the same as set forth in Petitioners' brief in the court below, except that references to the appendix and its contents, exhibits, and other parts of the record below are omitted herein.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1), which provides that this Court may review cases in the courts of appeals "by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The *per curiam* decision and judgment sought to be reviewed was decided and entered on July 9, 1973, and the statutory provision believed to confer jurisdiction on this Court to review the said decision and judgment by writ of certiorari is 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW (BASED UPON FOURTH CIRCUIT'S PER CURIAM ADOPTION OF DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW)

1. Was the district court with pendent jurisdiction to (a) order transfer of Respondent's membership into Petitioner Local 540, and (b) award damages to Respondent for lost wages, injury to reputation, and humiliation and embarrassment?

2. Are the district court's findings that Respondent duly presented his transfer card to the Petitioners, in accordance with the union constitution, amply supported by the record and in law?

3. Are the district court's findings that Respondent sustained damages for lost wages, injury to reputation, and humiliation and embarrassment amply supported by the record?

STATUTES INVOLVED

This case involves a claim asserted under the "Bill of Rights" subchapter of the Labor-Management Reporting and Disclosure Act of 1959. Respondent brought his action in the U.S. District Court for the Eastern District of Virginia—Newport News Division, pursuant to Section 101 (a)(1) of that Act, 29 U.S.C. Sec. 411 (a)(1), which provides as follows:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

Respondent further brought his action in the district court pursuant to Section 3 (i) of the Act, 29 U.S.C. Sec. 402 (i), which provides as follows:

> "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

Respondent further brought his action in the district court pursuant to Section 3 (o) of the Act, 29 U.S.C. Sec. 402 (o), which provides as follows:

> "Member" or "member in good standing", when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

Respondent further brought his action pursuant to Section 102 of the Act, 29 U.S.C. Sec. 412, which provides as follows:

> Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Respondent further brought his action in the district court pursuant to 28 U.S.C. Sec. 1337, which provides as follows:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the district court below is shown under the heading "Statutes Involved," *supra.* In the district court, Respondent also asserted pendent jurisdiction in his complaint.

As will appear more fully hereinafter, review on certiorari should be granted in accordance with Rule 19 (b) of the Rules of the Supreme Court of the United States because (1) the *per curiam* decision of the Fourth Circuit is in conflict with the decisions of another court of appeals on the same matter; (2) the Fourth Circuit has decided important questions of federal law which have not been, but should be, settled by this Court; (3) the Fourth Circuit has decided a federal question in a way in conflict with an applicable de-

cision of this Court; (4) the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

STATEMENT OF CASE

Respondent brought an action pursuant to 29 U.S.C. Sec. 411 (a)(1) alleging that while a member in good standing of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (International) and of Local 272 of that international union, the Respondent, a pipefitter, was improperly denied transfer of his membership in Local 272 to the Petitioner Local 540 in Newport News, Virginia.

Respondent sought injunctive relief ordering his transfer of membership from Local 272 into Petitioner Local 540, as well as an award of damages. The district court, Honorable John A. MacKenzie presiding, ruled on February 25, 1972, that the said action was maintainable, notwithstanding the district court's observation that "prior to the filing of his complaint with this court, plaintiff was heard on essentially the same complaint before the National Labor Relations Board. The Board found against the plaintiff on the merits and gave the plaintiff the opportunity to withdraw his complaint, which the plaintiff, in fact, did".

This case was tried without a jury on September 22, 1972. A motion to dismiss as to the then defendant International was granted at the conclusion of plaintiff's evidence, and this petition is now maintained by the two remaining defendants, Ralph D. Edgerton and Local 540.

Prior to trial, the parties stipulated to the following facts which the district court adopted as part of its findings:

A. That the Respondent, George Lusk, was a member of Local 272 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

B. That the Respondent had a travel card from Local #272 which the Respondent claims was presented to Local 540 on the 24th day of November, 1969. This card was accepted by the Local #540 business agent, Petitioner Ralph D. Edgerton.

C. That thereafter the Respondent presented a transfer card to the business agent of Local 540, Ralph D. Edgerton, at which Respondent claims was the proper time and said transfer card was not accepted by said Ralph D. Edgerton.

D. That the transfer card of the Respondent was presented by him to the Petitioner Local 540 on one occasion only.

E. That damages, if any, concerning loss of employment would start November 24, 1970, and continue thereafter.

F. That on or about July 26, 1971, the Respondent, George Lusk, filed a similar complaint against the Local 540 with the National Labor Relations Board. Thereafter, the board investigated the complaint and after conferring with the Respondent the complaint was withdrawn.

G. That the Respondent's income for the last four years is as follows:

1968	$ 6,649.76
1969	7,654.30
1970	14,401.40
1971	7,414.42

H. That with the exception of thirty dollars, the Respondent's entire income for the year 1970 was derived from earnings at Stone & Webster Engineering Corporation.

The district court further found as follows:

1. That the travel card referenced in stipulation B, *supra,* had been issued properly in accordance with the International's constitution;

2. That by virtue of the said travel card and as authorized by the said constitution Respondent worked out of Local 540 after November 24, 1969, and paid dues to both his home local, Local 272, and Local 540 through March, 1971; and that Respondent's March, 1971, dues payment to Local 540 was returned to him by that local.

The record shows, however, that Respondent paid his dues to Petitioner Local 540 through January, 1971, and that his February, 1971, check for that month's dues (said check reproduced at back of Petitioners' brief in the court below) had been returned to him by Local 540 on the ground that Respondent had previously, on January 13, 1971, picked up his travel card. On the second half or reverse side of Respondent's union dues payment card with Local 540, appears the handwritten notation: "Received TC 1/12/71 Reported back Offered Catalytic job—refused by Lusk Accepted T. C." At the trial, when first asked by his counsel "What happened to your travel card?", Respondent answered "I don't know". Thereafter, upon further questioning by his counsel, Respondent denied that he ever got his travel card back.

3. That on November 24, 1970, Respondent presented his transfer card to Edgerton. *Notwithstanding Edgerton's testimony* that the transfer card was presented prematurely, in violation of the International's constitution and Edgerton's further testimony that he advised Respondent "George, it is too early, it is out of order," the district court accepted Respondent's testimony that the transfer card was presented

to Edgerton on November 24, 1970, because Respondent, *"knowledgeable as he was of the terms and conditions of the constitution, would be unlikely to make a mistake in this regard"* (italics supplied). The district court further accepted Respondent's testimony in this connection because Respondent testified that he presented his transfer card to Edgerton on the same date Respondent was fired from his job at Stone & Webster Engineering Corporation, "a fact which had been established in evidence *as being November 23 or 24, 1970*" (italics supplied).

Respondent has recognized the union constitutional requirement that his travel card must first have been on file with Local 540 for twelve months or more before his application for and presentation of his transfer card to that local union, and it was Respondent's testimony that he presented his transfer card exactly twelve months to the day. At the trial, Respondent specifically testified on direct examination that with respect to his transfer card he had complied with all the union rules and regulations. In his deposition, Respondent acknowledged that if his transfer card had been presented prematurely, by even one day, that Local 540 would not be required to accept it, and at the trial Respondent acknowledged the union constitution as governing his transfer rights. In his deposition, Respondent apparently felt that he had met the twelve-month requirement because he had paid his dues to Local 540 from November, 1969 until January, 1970, a period of fourteen months of dues payments.

On the face of the transfer card (reproduced at back of Petitioners' brief in the court below) *presented by Respondent it is provided that it must be accepted upon presentation provided that the person presenting it "has fulfilled the requirements of the constitution covering transfer cards"* (italics supplied).

4. The district court further found it to be the policy of Local 540 not to accept new members on transfer cards unless absolutely necessary, and that only three have ever been accepted out of the many applications during Edgerton's tenure as business agent of some years.

Edgerton's testimony was that he had been business agent since September, 1968 (about four years), that with respect to the number of transfers accepted he was "guessing," and that he would "hesitate to say" how many transfers had been requested, "quite a few." *With respect to these transfer requests by others, the district court itself had observed at trial that* "insofar as this suit is concerned, it does not make any difference how many other people they (Petitioners) were arbitrary with, if they were arbitrary with your client (Respondent). It is not a class action. I would doubt the relevance of it."

Edgerton further testified on cross-examination that requests for transfer are honored when the terms of the union constitution are complied with to the full extent.

5. The district court found that Respondent's transfer card was prematurely issued by Respondent's home Local 272 since Sec. 181 (d) of the union constitution provides that none shall be issued until the member requesting transfer has a valid travel card on file in the local union to which he wished to transfer (Local 540) for at least one year prior to his application therefor. The transfer card was issued by the home local (Local 272) on November 3 (1970). It should not have been issued until November 24, the district Court found.

Sections 181 (g) and (h) of the union constitution further provide a transfer card must be accepted by a local union or business agent "properly presented" and "issued in accordance with this Constitution."

6. The district court found that Local 540 received due notice of Respondent's change in domicile and residence.

7. The district court also found that the reason given to Respondent for rejection of his transfer card was that Respondent had presented it "too early." This is what Edgerton testified. At the trial, Respondent testified that when he presented his transfer card to Edgerton, Edgerton allegedly said that he, Edgerton, "wouldn't touch it with a ten-foot pole." In his deposition, Respondent testified that when he presented his transfer card to Edgerton, Edgerton allegedly threatened him. In his February 3, 1971 letter to the International, Respondent stated he was allegedly told by Edgerton that the transfer card would not be accepted unless Respondent agreed "to let the men vote me in. . . ." These represent three separate and different versions given by Respondent as to what allegedly transpired when Respondent presented his transfer card to Edgerton. At the trial, Respondent did not claim any such alleged "threat" made by Edgerton, but in his deposition admitted that he had once followed Edgerton home in his car for about ten minutes.

8-13. The district court found that as a result of not being accepted as a member of Local 540 the Respondent has suffered loss of wages, been damaged in his reputation and suffered humiliation and embarrassment. When asked by the district court how he would measure Respondent's damages, Respondent's counsel said, "To be quite honest, I don't know . . . anything I said, your Honor, *would be a guess, and would be speculation* (italics supplied). The district court responded (italics supplied), *"That doesn't leave the court much to go on. If you would be speculating, the court would be, too."* To this Respondent's counsel wholeheartedly agreed. *In oral argument before the Fourth*

Circuit, Respondent's counsel again conceded that any claim for damages was speculative. In its ninth finding of fact, the district court found no acceptable evidence of alleged "threats" against Respondent, *and at the trial, with respect to the "humiliation" allegedly suffered by Respondent, the district court concluded the Respondent's evidence to be "slim."*

In its eleventh finding, the district court found in part that as a member of Local 540, Respondent would have earned between $10,000 and $11,000 for the year 1970. *Previously in its findings the district court had adopted the stipulation of the parties that in 1970 Respondent had earned well over $14,000 while employed at Stone and Webster Engineering Corporation.* In its twelth finding of fact, the district court acknowledged *"that there is no record of the plaintiff's earnings in 1972 . . ."* (italics supplied).

In its thirteenth finding of fact, the district court acknowledged "evidence that the plaintiff has had a *poor work record and been fired from various jobs for unsatisfactory performance, namely, drinking on the job and on one occasion sleeping on the job . . ."* (italics supplied). The district court noted evidence from a "fellow worker" of Respondent's at Stone and Webster that others were guilty of drinking on the job, that the Respondent took no more time off than usual, and that Respondent's work was satisfactory. At the trial, the district court had stated, *"I don't think everybody drinking on the job is any more defense to this man's drinking on the job than if you say everybody speeds on the highway . . ."* (italics supplied).

The "fellow worker" at Stone and Webster referred to by the district court in its thirteenth finding of fact was Paul Brady. Brady testified on direct, with respect to Respondent's absenteeism, "No, I wouldn't know about that." On cross-

examination, Brady testified that he didn't know the degree or number of Respondent's absences. With respect to Respondent's work performance at Stone and Webster, Brady testified that he is not a welder, but rather a pipentter who worked for a time with Respondent who was a welder. Respondent himself testified at trial that he was fired by Stone and Webster for absenteeism, and that he had "missed quite a bit of work over there."' For this reason, Respondent had been denied unemployment compensation.

The district court concluded, on the basis of Sec. 109 of the union constitution, that the Petitioners would "likely" give preference in employment to members of Local 540. *There was no evidence presented of such discrimination. To the contrary,* Respondent himself testified at trial that Local 540 had referred him out to a substantial number of jobs over a period of years, that Respondent had worked on permit out of Local 540 for three and one-half years before Respondent had a travel card, that Local 540 had referred him to the big Stone and Webster job, as well as to other contractors. The union contract contains express provisions for exclusive non-discriminating hiring and job referrals. Employers expressly reserve the right to reject job applicants referred by the union. Edgerton testified that his duties as business agent for Local 540 are to "keep all your men employed, and they are treated equal and fair."

The district court denied punitive damages, but allowed Respondent compensatory damages in the amount of $7,500 and ordered Petitioners Edgerton and Local 540 to accept Respondent's transfer card and to accept Respondent as a member in Local 540.

ARGUMENT

1. The District Court Lacked Jurisdiction To Order Respondent's Transfer Of Membership Into Local 540, And Further Lacked Jurisdiction To Award Respondent Compensatory Damages.

As in *Hughes* v. *Iron Workers, Local 11,* 287 F. 2D 810 (CA 3, 1961), cert. den., 368 U.S. 829 (1961), this case involves a claim asserted under the "Bill of Rights" subchapter of the Labor-Management Reporting and Disclosure Act of 1959. In the case at bar, Respondent seeks to compel Petitioner Local 540 to accept his transfer of membership from Local 272, both locals being local unions of the International union. In addition, Respondent seeks to sustain an award of compensatory damages granted him by the district court.

Unlike *Hughes,* however, Respondent has not fulfilled the requirements of membership in Local 540 because, as the district court's finding number 5 states, Respondent's transfer card was prematurely issued to him by his home local, Local 272, in violation of Sec. 181 (d) of the union constitution. The court in *Hughes specifically* recognized that the "act's protection is extended to those who are in substance members, despite the fact that the officials of the particular labor organization have not performed the ministerial acts precedent to formal admission and recognition." 287 F. 2D at 815. In *Hughes,* the court specifically recognized the prerequisite that the plaintiff must have complied with all transfer of membership requirements in the constitution of the International. In the case at bar, only when this first occurs, and the *Hughes* court so recognized, does Local 540 lose its discretion to reject Respondent's membership. For these reasons, the district court lacked jurisdiction, pendent or otherwise, to grant Respondent relief.

The *Hughes* court specifically addressed itself to the relief sought by Respondent in the case at bar, i.e., a transfer of

membership from Local 272 into Local 540. Referring to Hughes as a "member" of the local union to which he sought to transfer, i.e., *arguendo,* a "member" within the meaning of the Act, the *Hughes* court concluded that he was also entitled to the specific rights (to vote in union elections, attend union meetings, etc.) specified under the Act. *But, with respect to ordering an actual transfer of membership from one local to another,* the court in *Hughes* stated "there is no warrant in the statute for granting a member of a labor organization any other membership rights secured to him by the union's constitution and by-laws which are enforceable only under state law in a suit such as that at bar." The court then concluded that Hughes would only be entitled to relief to secure his equal rights and privileges guaranteed under the Act, *not including transfer of membership from one local to another. Hughes, supra,* 287 F. 2D at 818.

Only in a footnote did the *Hughes* court observe that Hughes was not asserting any causes of action arising under state law. It is submitted that even if Hughes had so asserted, the *Hughes* court would have reached the same result because the Act was and is specific as to the rights and privileges guaranteed thereunder. This is precisely the way the district court in *Ferger* v. *Iron Workers Local 483,* 238 F. Supp. 1016 (D.C. N.J., 1964), interpreted the *Hughes* case. The district court in *Ferger* was wholeheartedly affirmed on appeal by the same Third Circuit that had decided *Hughes,* 342 F. 2D 430 (CA 3, 1965). To the same effect see *Ferger* v. *Iron Workers, Local 483,* 356 F. 2D 854 (CA 3, 1966), cert. den. 384 U.S. 902 (1966).

Thus, as is evident when the *Ferger* litigation moved into the New Jersey *state* court, the *Ferger* plaintiffs contended that while in federal court, they had sought two remedies—

a determination of their rights under the Act, *and an order directing their transfer into the defendant local's membership rolls.* The Ferger plaintiffs further pointed out that they were denied the underscored relief in federal court because of a lack of federal jurisdiction. *Ferger* v. *Iron Workers, Local 483,* 94 N.J. Super. 554 (N.J. Sup. Ct., Ch. Div., 1967), 55 Labor Cases Para. 51, 664. The New Jersey court discussed the doctrine of pendent jurisdiction, observing that such a problem does not ordinarily arise in *diversity* cases, but does arise when a plaintiff comes into federal court solely on the basis of a claim arising under federal law, such as the case at bar. The New Jersey court then concluded that the federal courts had declined to exercise pendent jurisdiction with respect to ordering transfer of membership from one local to the membership rolls of another. *Ferger, supra,* 94 N.J. Super. 554. The New Jersey state court then took jurisdiction to effect such a transfer, and was affirmed in its reasoning by the Appellate Division of the New Jersey Superior Court, 235 A. 2D 482 (1967).

So, too, in *Parish* v. *Legion,* 450 F. 2D 821 (CA 9, 1971), decided *after United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966), the Ninth Circuit, relying on the Third Circuit's decision in *Hughes, supra,* concluded that if plaintiffs who sought transfer of membership from one local union to another were entitled to relief, "it should be limited to that appropriate to secure to appellants the equal rights and privileges guaranteed by Section 101 (a) (1) and other provisions of the Labor Management Reporting and Disclosure Act," citing *Hughes, supra,* 287 F. 2D at 818.

All of the foregoing rationale with respect to the lack of pendent jurisdiction in federal courts to order transfer of membership from the membership rolls of one local union to the rolls of another, applies with even greater force to

an award of *compensatory damages,* as in the case at bar, which finds no basis whatsoever under the Act.

Further, no relief is available to Respondent under the Act because as the *Hughes* court recognized, the Act first contemplates and requires the plaintiff to fulfill the membership requirements of the International constitution. Although at trial there was a conflict of testimony as to when Respondent presented his transfer card to Edgerton, there is no dispute that Respondent's transfer card was improperly *issued* to him by his home local, in violation of the union constitution, and the district court so found in its fifth finding. Further, on the face of Respondent's transfer card Respondent was put on notice that he must first have *"fulfilled the requirements of the constitution covering transfer cards"* (italics supplied). Even if Edgerton was incorrect in believing that the transfer card had been presented by Respondent to Edgerton before Respondent's travel card had been on file with Local 540 for at least one year, there is no question, nevertheless, that Respondent's transfer card was improperly *issued* to him at the very outset.

2. The District Court's Findings that Respondent Duly Presented His Transfer Card, In Accordance With The Union Constitution, Are Incorrect, And Are Not Amply Supported By The Record Or In Law.

In *Vessella* v. *U.S.*, 405 F. 2d 599, 600 (CA 4, 1969), the court stated the standard for the findings of fact of a district court, sitting without a jury (as in the case at bar), as follows: "This finding is amply supported by the record and is binding on us under Fed. R. Civ. P. 52."

As previously discussed, the district court's fifth finding correctly states that Respondent's transfer card was issued to him prematurely in contravention of the International

constitution. Further, Respondent himself testified that the constitution governed his rights to transfer and that in this respect it was the law. Respondent also testified that he was familiar with the pertinent sections of the constitution at the material times, and it has been shown that the very face of his transfer card placed him on notice of the constitutional requirements. Indeed, the district court in part correctly concluded in its third finding that Respondent was "knowledgeable . . . of the terms and conditions of the constitution."

Yet the district court also concluded, and it is earnestly submitted incorrectly so, that the premature issuance of Respondent's transfer card by his home local, Local 272, is a mere "technicality," notwithstanding the constitutional violation. Section 181 of the constitution deals with transfer cards. If the requirements are technical, they are also clear. If the requirements are technical, they are also serious. And if the requirements are technical, they were so intended to be. Sections 181 (d) (g) and (h) leave no doubt whatsoever that the transfer card *must first* have been properly *issued*.

There is no absolute right to union membership. In *Parish* v. *Legion*, 450 F. 2D 821, 824 (CA 9, 1971), the court states, "We concluded in *Moynahan* that Congress did not intend Section 3 (o) to 'limit the previously recognized rights of unions to choose their members.' 317 F. 2D 210. This rule is also expressly recognized in *Hughes*, 287 F. 2D at 817, and impliedly in *Ferger*, 238 F. Supp. at 1023." Discretion to admit to or refuse membership is lost only when the rules pertaining thereto have been complied with. It is well settled that "a union's constitution, rules and by-laws constitute a binding contract between the union and its members and between its members, which contract the courts will enforce if it is not immoral, contrary to law or

public policy, or beyond reason." 87 C. J. S. Trade Unions, Section 11, page 772. To the same effect, see 31 Am. Jur., Labor, Sec. 33, page 415, cited in *United Brotherhood* v. *Moore*, 206 Va. 6, 10-11, 141 SE 2D 729 (1965).

In *Moore, supra*, the Virginia Supreme Court states that "inferred or implied powers must rest upon some provision of the constitution, for it embodies the association's whole plan of existence. All rights, privileges and duties of both the association and its members must be found in the constitution. We are not permitted to look elsewhere for them." The premature issuance of Respondent's transfer card was not only the responsibility of his home local, Local 272, the issuer, but was Respondent's responsibility as well. "She (Mrs. Kiser) was charged with knowledge of the limited authority of the officers and agents of the defendant. The constitution not only constitutes the contract between a member and the association but it also constitutes the contract between a member or members and other members." *United Brotherhood* v. *Moore, supra.*

Indeed, "a person applying for membership in a fraternal benefit association is charged with the duty of acquainting himself with its constitution and by-laws; and, in the absence of fraud, is conclusively presumed to know the qualifications for membership therein prescribed and the limitations thereby imposed upon the power and authority of its officers, and upon its subordinate lodges and their officers as its agents. The same rule, of course, applies to persons who have become members." *International Brotherhood, etc.* v. *Wood*, 162 Va. 517, 552, 175 SE 45 (1934). Federal cases cited hereinabove recognize that the union constitution is the determining source. If a federal court were to exercise pendent jurdisdiction, therefore, Respondent's state claims would, on their merits, have to be resolved against him.

There is a conflict in the testimony as to the date on which Respondent *presented* his transfer card to Edgerton. Respondent maintains that he presented it exactly twelve months to the day after his travel card had been on file with Local 540 for that length of time. Edgerton testified that it was presented prior thereto and was therefore "too early" and "out of order". This is what Edgerton previously had advised the National Labor Relations Board. On the other hand, Respondent gave three different stories as to what Edgerton advised him at the time his transfer card was presented; which version of Respondent's could possibly be amply supported by the record? It is submitted that only Edgerton's testimony is amply supported by the record under these circumstances.

Even if Edgerton had been incorrect in his belief that the transfer card was *presented* prematurely, nevertheless there is no dispute that it had been issued prematurely, and this the district court correctly so found. In this connection, on the basis of the authorities discussed above, Edgerton had no authority to accept the transfer card because it had been *issued* in violation of the International constitution.

Why didn't Respondent present the card again, instead of having presented it only once as was stipulated by the parties? This would have been a simple thing to do after only a short period of time. Contrary to the said stipulation of the parties, and contrary to Respondent's own testimony, in his unfair labor practice charge filed with the National Labor Relations Board Respondent represented that *"since* November 24, 1970 Local 540 . . . has refused to accept his transfer card" (italics supplied). Yet Respondent has testified and now maintains that he presented it only one time, allegedly on November 24, 1970. To the same effect, see the false allegation in paragraph 13 of Respondent's complaint. It should be noted that although the complaint was

not personally signed by Respondent, the unfair labor practice charge, which Respondent subsequently withdrew, was.

It is submitted that Respondent presented his transfer card only one time for the same reasons he picked up his travel card as discussed below, i.e., his desire to seek employment elsewhere because of the area employers' disenchantment with his poor work record, a record so found by the district court.

3. The District Court's Findings That Respondent Sustained Damages For Lost Wages, Injury To Reputation, And Humiliation And Embarrassment Are Not Amply Supported By The Record.

Respondent was referred to the Stone and Webster job by the Petitioners. He was fired by Stone and Webster for excessive absenteeism and not being dependable. By his own testimony he missed quite a bit of work at Stone and Webster. He conceded that others had been fired by Stone and Webster for drinking, although this apparently was overlooked by the district court in its thirteenth finding. He denied that Stone and Webster fired men for sleeping on the job, and was then impeached by testimony he had given in his deposition.

Yet somehow Respondent chose to blame his shortcomings on the Petitioners. His letter of February 3, 1971 to the International makes the wild assertion that Edgerton went to the Stone and Webster jobsite and had him fired. In his deposition he admitted that he drank on the job at Stone and Webster, yet in the same deposition he reasserted that it was the union, not Stone and Webster, who fired him. He maintained this position at trial. He was fired by Stone and Webster on November 24, 1970, and the parties to this lawsuit have stipulated that Respondent's damages, if any, would start from that date. It seems rather clear that the

true "reason" for Respondent's suit is his unfounded notion that he was "fired by the union." In his deposition and at trial he stated that he would produce two Stone and Webster officials, William T. Stephenson and D. H. Armstrong, to prove this. At trial, Stephenson, a timekeeper at Stone and Webster, who was called as Respondent's witness, testified on cross-examination that Respondent was fired for absenteeism and not being dependable. He denied having told Respondent the "union" had fired him or that Petitioners had exerted any pressure on Stone and Webster to do this. He indicated that the foreman, a union member, had the power to fire Respondent and apparently did so. The foreman's name was W. W. Branch. However, this was approved by the non-union supervisor, according to Stephenson. This apparently is the whole theory of Respondent's case—if discipline is imposed by a foreman who is also a union member, then it is the union's fault, not Respondent's shortcomings. In this connection, see his testimony in his deposition where he was fired by another employer, Rollin Tompkins, and similarly blamed the union.

Armstrong, also called as a witness for Respondent, was Resident Manager at Stone and Webster. On cross-examination he flatly denied ever having told Respondent (contrary to Respondent's specific assertion) that Respondent was fired by Stone and Webster because of the Petitioners. He further specifically stated that the Petitioners had exerted no pressure or influence on Stone and Webster to have Respondent fired, nor did anybody else in Local 540.

The conclusion is inescapable that Respondent's shortcomings were severe and were his own—no one else's. The district court's thirteenth finding correctly acknowledges Respondent's poor work record. *It is graphically illustrated by the testimony of former employers who testified at his trial.*

This testimony shows that plaintiff would not now be rehired by these employers. In this connection, see Edgerton's June 6, 1969 letter to Respondent also, and Edgerton's August 13, 1971 letter to the International.

The evidence shows that Respondent picked up his travel card from Petitioners on January 13, 1971. Edgerton explained how he concluded that Respondent had presented his transfer card too early, and the circumstances under which Respondent picked up his travel card thereafter, including Respondent's having failed a welding test at Anheuser-Busch. As previously discussed, Respondent had good reason to seek employment elsewhere because of his bad work record in Local 540's area. Edgerton gave additional testimony on these reasons.

The fact is, Petitioners did all in their power to help Respondent, and he obtained a substantial amount of work from Local 540 referrals over a period of years according to Respondent's own testimony.

If the district court's eleventh finding is correct, rather than purely speculative (as it is in view of Respondent's poor work record), then in 1970 Respondent benefited by *not* being a member of Local 540, because Respondent earned more at Stone and Webster (a job he was referred to on travel card status by Petitioners).

There is no record of Respondent's 1972 earnings (which was Respondent's burden to establish) as shown in the district court's twelfth finding; both the district court and Respondent's counsel conceded his damages to be speculative; and the district court observed at trial that Respondent's evidence as to his alleged "embarrassment and humiliation" was "slim."

The district court's speculation and conjecture went still farther. The district court, *without any evidence to serve as*

a basis, concluded that Edgerton was likely to prefer members of Local 540 over non-members under the exclusive hiring arrangement in the collective bargaining agreement. The evidence shows to the contrary. Respondent obtained his full share of job referrals out of Local 540, including the big Stone and Webster job. This assumption and conclusion by the district court completely runs against the grain of *Teamsters, Local 357* v. *N. L. R. B.,* 365 U.S. 667 (1961). The exclusive hiring arrangement in the case at bar contains an express non-discrimination clause. As the Supreme Court in *Teamsters, supra,* laid the law down quite clearly, "We cannot assume that a union conducts its operations in violation of law or that the parties to this contract did not intend to adhere to its express language," 365 U.S. at page 676.

CONCLUSION

The Fourth Circuit's judgment against Petitioners Edgerton and Local 540 should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jay J. Levit, attorney for the Petitioners, certify that two copies of the foregoing Petition for Writ of Certiorari have been served upon counsel for the Respondent by mailing said copies to them in the United States mails, postage prepaid, addressed to Yacobi and Wood, 809 Main Street, Newport News, Virginia 23605.

This 5th day of October, 1973.

JAY J. LEVIT